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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RONALD BERRY, Plaintiff and Appellant, v. LYNN STROUD et al., Defendants and Respondents.	2d Civ. No. B293135 (Super. Ct. No. 17CVP-0313) (San Luis Obispo County)

Ronald Berry, who is self-represented, filed a complaint against Lynn Stroud for, among other things, electronic eavesdropping pursuant to Penal Code sections 632 and 637.2.[1] That claim was based upon residential security camera recordings of Berry's conversations with coworkers at a construction site next to the home he had built for Lynn and Dean Stroud (collectively "the Strouds").

[1] All statutory references are to the Penal Code unless otherwise stated.

Section 632 prohibits the intentional recording of a confidential communication without the consent of all parties to the communication. The trial court afforded Berry three attempts to plead "facts which would indicate he had a reasonable expectation of confidentiality in conversations he held at the job site, or in the area of the [Strouds'] surveillance system." Finding he had failed to meet his burden, the court sustained the Strouds' demurrer to the second amended complaint (SAC) without leave to amend.[2] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Berry was retained by Kleck Road, LLC to design and build 12 homes in a tract in Paso Robles. The Strouds contracted with Kleck Road, LLC to have Berry build a home for them in that tract. After discovering defects in the construction, the Strouds filed complaints against Berry with various state boards and brought a civil action based upon the Right to Repair Act (Civ. Code, § 895 et seq.).

Lynn Stroud also requested a civil harassment restraining order against Berry. During that proceeding, she introduced residential security camera recordings of conversations between Berry and others at the neighboring construction site. The trial court issued a temporary restraining order but concluded, after an evidentiary hearing, that there was insufficient evidence of harassment.

After learning of the recordings, which were taken from a surveillance system installed on the Strouds' property, Berry

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[2] Berry's original complaint named Lynn Stroud as the defendant. The first amended complaint (FAC) was filed against Lynn and Dean Stroud. The SAC included just Lynn Stroud. Because the judgment is in favor of Lynn and Dean Stroud, we treat this as an action against both defendants.

filed a complaint against Lynn Stroud for electronic eavesdropping and intentional interference with contractual relations. The trial court sustained Lynn Stroud's demurrer to both causes of action with leave to amend. It determined Berry had failed to allege facts "which indicate he had an objectively reasonable expectation of confidentiality in every conversation that may have been recorded."

The FAC alleged claims against the Strouds for electronic eavesdropping and intentional interference with contractual relations. Once again, the trial court determined Berry had not pleaded facts demonstrating an objectively reasonable expectation of confidentiality in any of the conversations that may have been recorded. The court sustained the Strouds' demurrer as to both causes of action, but granted leave to amend the electronic eavesdropping claim.

The SAC again alleged that Lynn Stroud committed electronic eavesdropping in violation of sections 632 and 637.2. Berry asserted that he "and third parties were engaged in typical construction chatter not suitable for public consumption," and that "[t]he remarks themselves meet[] the standard that no reasonable person making such remarks would want them heard or recorded." The trial court concluded this was insufficient to show "the parties[] intended the communication to be confidential." It noted that "[o]ther than alleging that he and his coworkers had conversations of a nature that they would not have had offsite, [Berry] provides no such circumstances indicating that he intended those conversations to be confidential." The court sustained the Strouds' demurrer without

leave to amend and entered judgment accordingly. Berry appeals.[3]

DISCUSSION

Berry requests that we reverse the judgment and direct the trial court to enter a new order overruling the demurrer. He maintains there is no pleading defect. We disagree.

Standard of Review

"In our de novo review of an order sustaining a demurrer, we assume the truth of all facts properly pleaded in the complaint or reasonably inferred from the pleading, but not mere contentions, deductions, or conclusions of law. [Citation.] We then determine if those facts are sufficient, as a matter of law, to state a cause of action under any legal theory." (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.) To prevail on appeal from an order sustaining a demurrer, "the appellant must affirmatively demonstrate error. Specifically, the appellant must show that the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer. [Citation.] We will affirm the ruling if there is any ground on which the demurrer could have been properly sustained." (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752.)

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[3] The Strouds contend Berry's appeal is improper because he appealed the order sustaining the demurrer to the SAC, which is nonappealable, rather than the appealable judgment. They are incorrect. The notice of appeal confirms that the appeal is from the "[j]udgment of dismissal after an order sustaining a demurrer."

The Demurrer to the SAC Was Properly Sustained Without Leave to Amend

The Invasion of Privacy Act (§ 630 et seq.) is designed to "protect the right of privacy by, among other things, requiring that all parties consent to a recording of their conversation." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 769 (*Flanagan*).) Section 637.2 allows a plaintiff who has been injured by a violation of the Act to bring a civil action for $5,000 or three times the amount of actual damages sustained, if any, whichever amount is greater.

Section 632, subdivision (a) imposes liability on "[every] person who, intentionally and without the consent of all parties to a confidential communication, [by means of any] electronic amplifying or recording device, [eavesdrops] upon or record[s] the confidential communication . . . ." Subdivision (c) defines "'confidential communication'" to include "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made . . . in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

Thus, a communication is confidential under section 632 "if a party to the conversation had *an objectively reasonable expectation* that the conversation was *not being overheard or recorded*." (*Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377, 1396; *Flanagan*, *supra*, 27 Cal.4th at pp. 774-776; *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 235, fn. 15 [a conversation is confidential if the circumstances objectively indicate that any participant "reasonably expects and desires that the conversation itself will not be directly overheard by a

nonparticipant"].) The parties' subjective assumptions are irrelevant. (*Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 929.) "The issue whether there exists a reasonable expectation that no one is secretly [recording or] listening . . . is generally a question of fact" (*Kight*, at p. 1396), but this does not mean a jury trial is required in all cases where the confidentiality of the communication is in dispute. In an analogous context, our Supreme Court has recognized that when the undisputed facts show no reasonable expectation of privacy, the issue may be adjudicated as one of law. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40; see *Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 226-227 [demurrer may be sustained when only one inference may be drawn from facts].)

To assess whether it was objectively reasonable for a party to expect that a communication would not be overheard or recorded, the court must review the circumstances surrounding the communication. (See, e.g., *Santa Ana Police Officers Assn. v. City of Santa Ana* (2017) 13 Cal.App.5th 317, 320 [police officers executing a search warrant on a drug operation could not have a reasonable expectation their conversations were not being overheard or recorded]; *Safari Club International v. Rudolph* (9th Cir. 2017) 862 F.3d 1113, 1123 [conversation in public restaurant was confidential because the parties stopped talking when a waiter or another patron came by their table]; *Cuviello v. Feld Entertainment, Inc.* (N.D. Cal. 2015) 304 F.R.D. 585, 591 [conversation in public was confidential where the plaintiff ensured that no one was close enough to hear it].)

Here, the SAC generally alleges that Berry "and third parties were engaged in typical construction chatter not suitable for public consumption," and that the participants "had every reason to believe the conversations were not being overheard or

recorded." It further alleges "[t]he remarks themselves meet[] the standard that no reasonable person making such remarks would want them heard or recorded. The work site is on private property, not open to the public and is a considerable distance from the public street which has very little or no foot traffic."

As the trial court noted, Berry has provided no details regarding the alleged confidential communications, other than to say they were "typical construction chatter." Berry identifies neither the participants to the communications, nor the dates, times and specific nature of the communications. He seems to assume that all conversations at the construction site were meant to be confidential, but alleges no facts demonstrating that he and his coworkers took steps to ensure they could not be overheard by neighbors and others passing by. Berry also fails to explain why conversations that are "typical" in a construction setting would be expected to be confidential. In the absence of additional information regarding the circumstances surrounding those conversations, it is impossible to evaluate whether there was an objectively reasonable expectation of privacy in these communications.

Faulkner v. ADT Sec. Services, Inc. (9th Cir. 2013) 706 F.3d 1017 (*Faulkner*) is instructive. The plaintiff in that case alleged he had engaged in a confidential communication when he called the defendant to dispute a charge. (*Id.* at p. 1020.) He further alleged the "conversation was confidential because it was 'carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined thereto.'" (*Ibid.*) The court determined that because the latter allegation was "no more than a '[t]hreadbare recital[]' of the language [in] Section 632," it was insufficient to overcome a motion to dismiss. (*Ibid.*; see *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678.)

Faulkner also determined the first allegation failed to "to lead to the plausible inference that [the plaintiff] had an objectively reasonable expectation of confidentiality. Although circumstances may arise under which the nature of the relationship or the character of the communications between a customer and a home security company could plausibly constitute a confidential communication under [section 632], here, the detail that [the plaintiff] alleges is merely consistent with such a conclusion. In other words, too little is asserted in the complaint about the particular relationship between the parties, and the particular circumstances of the call, to lead to the plausible conclusion that an objectively reasonable expectation of confidentiality would have attended such a communication. [The plaintiff] has therefore failed to 'nudge[]' his claim 'from conceivable to plausible.' [Citation.]." (*Faulkner*, *supra*, 706 F.3d at p. 1020.)

The same is true here. Not only does the SAC provide a threadbare recital of the language in section 632, but it also alleges nonspecific facts that, at best, suggest a conceivable, rather than a plausible, claim. (See *Faulkner*, *supra*, 706 F.3d at p. 1020.) In sustaining the first two demurrers, the trial court advised Berry of the need to allege "circumstances which indicate he had an objectively reasonable expectation of confidentiality in every conversation that may have been recorded." Because he failed to do so, the trial court appropriately sustained the demurrer to the SAC.

Berry does not challenge the trial court's order denying leave to amend the SAC. Nor does he offer any proposed allegations demonstrating he might have had an objectively reasonable expectation of confidentiality. As explained in *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th

39, "[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. [Citation.]." (*Id.* at p. 44.) Where, as here, "the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action," the decision to deny leave to amend must be upheld. (*Ibid.*)

DISPOSITION

The judgment is affirmed. The Strouds shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Linda D. Hurst, Judge
Superior Court County of San Luis Obispo

Ronald Berry, in pro. per, for Plaintiff and Appellant.

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